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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 635

ALBERT SLUSARZ,
Appellant and Petitioner,

vs.

FRANK CYGAN,
Appellee

PETITION FOR WRIT OF CERTIORARI

ALBERT SLUSARZ,
21 Chicopee Street,
Chicopee, Mass.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays for a Writ of Certiorari issue to review the Judgment of the Massachusetts Superior Court entered March 25, 1956 and decree of the Massachusetts Supreme Court (full bench) entered Sept. 23, 1959.

Citations to Opinions Below

No opinions below.

Jurisdiction

Massachusetts Hampden ss. Superior Court, =75555 Frank Cygan Admr. Plaintiff vs. Albert Slusarz, Defendant.

Entered August 20, 1951

Massachusetts Hampden ss. Supreme Court, (full Bench) Albert Slusarz, Petitioner; Frank Cygan, Respondent.

Entered March, 1959

The jurisdiction of this Court is invoked under 42 U.S.C. 1981. The question involves violation of civil rights under 42 U.S.C. 1981, 28 U.S.C. 2101, Article 7 of the Constitution, Public Act 103-65 of the Congress, (Military Affidavit), Rule 36 of the Massachusetts Superior Court Rules.

Questions Presented

Discrimination, Constitutional right of a citizen to a jury trial benefit of the laws, due process of law, protection of the government—

Statutes Involved

42 U.S.C. 1981 28 U.S.C. 2101 Article 7 of the U.S. Constitution.

Public Act 103-65 of Congress, (Military Affidavit).

Rule 36 of the Massachusetts Superior Court Rules.

Statement

This is a civil tort action in common law begun by a writ August 20, 1951 by the respondent as administrator of the estate of late Paul Swiszcz, stepfather, for conscious suffering and death of the Plaintiff's intestate, as a result of an alleged fall from the alleged defective steps, leading from the ground to first floor back porch, at 73 School St., Chicopee. The Addamnum was $15,000.

The answer is a general denial.

This action was tried before (Dewing. J.) without jury and resulted in findings for the Plaintiff the sum of $5,000. March 25, 1956.

An appeal was heard before the Massachusetts Full Supreme Court September 23, 1959, dismissed as of that date. At that hearing, respondent was not present. Petitioner was alone; no opposition, no questions asked.

1) This case was inactive since November 1953. Petitioner reactivated it by sending 3 questions, allowed, properly filed, copies given to respondent, December 1955. When not answered within 20 days, petitioner filled out a printed form of the affidavit, *January 6, 1956.* APPLICATION UNDER RULE 36, extending the time to answer 30 days but the respondent did not answer within the 30 days nor after and under this rule 36 of the Superior Court should have been automatically non-suited but he was not.

March 9, 1956 a properly filled out Military Affidavit was presented at the clerk of court office and asked that this case be closed a judgment entered for the petitioner, but was not.

March 21 trial started and the petitioner handed the court a printed document entitled "DEFENDANT WON THIS CASE UNDER RULE 36. "The presiding judge read the title but did not open the paper and—

The Court: The Court directs the clerk not to accept this instrument.

March 25, finding was made for the Plaintiff of $5,000.

April 6. CONDITIONAL NONSUIT ENTERED JAN. 6, 1956. ORDER STRICKEN OUT AS OF MARCH 21, 1956. (Dewing, J.)

2) Petitioner received a Merit Motion list (for assignment of cases for March 5, 1956 and telephoned the clerk of court office that a mistake must have been made as the respondent did not answer the Interrogatories and should be non-suited. At the hearing neither Petitioner nor Respondent were present. "Nobody here?" asked Judge Murray, "take this case off the list. Have witness, but the case was not taken off the list.

3) At the start of this case 1951 the Respondent made a claim for jury trial, Petitioner who is a layman thought one jury claim enough but September 1953 close to trial time, Respondent secretly waived his jury right. The Petitioner

that same month filed a Motion for a late jury claim and it was heard on a Motion Session November 3, 1953 before the late Judge Leary who made no decision but put it aside thus the case becoming inactive. Judge Leary made no decision as I understood, his son a lawyer worked in Attorney John D. Ross's office, Attorney Ross the respondent.

The Petitioner somehow got the impression that jury trial is a basic American right and cannot be easily denied, but it was not so before Judge Rome. Petitioner argued that he is a veteran, this case involves death, jury trial is a basic right. The respondent said, "I have no objection to a jury trial". "Your Honor" I said, "Plaintiff has no objection to a jury trial, I want a jury trial, why should Your Honor object to it?" It was denied then and there.

This is a part of a "*Petition for Mistrial*" presented at the start of trial. March 21.

The Court: For the record, the deft. presents to the Court the following petition, 2 pages, entitled "*Petition for Mistrial.*" . . . The Court if it has the power denies the petition.—You may proceed, Mr. Ross.

4). This case involves a man, decedent, Paul Swiszcz whose age is given as both 67 and 73 yrs, who married a widow Mrs. Frances Cygan at 73 School St. 7 yrs before his death and came to live there. Petitioner is the landlord but does not live there. This man slept on the couch (photo Ex. A) on the back porch some time prior to his death June 8, 1951. His stepson, Frank Cygan came with his car into the yard after midnight and he found his stepfather lying dead in the yard with his 2 feet on the 2nd step. (Ex. A) called police who took picture (Ex. A) 2:15 A.M. showing those steps badly dislocated. Police and building inspector came in again 9 A.M. when petitioner was present and took pictures again, these steps were now normal, not dislocated. Petitioner was surprised, when at the trial these

pictures taken at 9 A.M. were not present and sent Deputy Sheriff Shine from the Court to Chicopee to subpoena these pictures and all police records.

Sergeant Gelinas came but he did not bring those pictures taken at 9 A.M. nor any written police record, said on stand he took about 3 pictures at 9:15 A.M. but he gave them all to the Building Inspector. Building Inspector on stand said he did not have those pictures, could not produce them.

Slusarz: You don't know what happened to them? Trans. Page 103.

Bldg. Inspector: No, I don't.

Slusarz: In your opinion, what was the direct cause of this man's fall?

Atty. Ross: I object. Court; Excluded.

Slusarz: Could you look at this pictures and tell us? (Excluded)

Slusarz: Where do you say those steps was faulty?

Atty. Ross: I object. Court: Excluded. All on page 131 Trans.

Slusarz: How do you account for the position of his hand over here?

Atty. Ross: I object. Court: Excluded.

5). Judge Dewing of the Superior Court made a finding of $5,000, for the respondent but gave no explanation. *Request for Rulings of Law* and a *Motion for New Trial.* Denied.

On a hearing before the Supreme Court September 23, 1959 the petitioner had the following Massachusetts Reports and argued, in brief.

312 M.438, 333 M.496, 234 M.307, 226 M.378, 269 M. 415, 328 M.595, 1940, A. S. 153; 25 N.E. 2nd. 191, 262 M. 437, 289 M.431, 303 M.242, 231 M.173, 299 M.177.

The result of all this writing and arguing—No meritorious case shown. Petition dismissed, without comment.

Reasons for Granting Writ

(No. 1 of Statement) (a) U.S. Supreme Court found in the case of Berrian & Chetwood *C.C.a N.Y.1881, 9 F.67*. "Where petition for removal was presented after Defendant's time to answer had expired and he was in default, there was no controversy between him and plaintiff within the meaning of the statute" . . .

B) Violation of an Act 103-65 of Congress. (Military Affidavit)

C) The order of March 21, not to accept a claim of non-suit and the order of April 6, are contradictory and a judge must take the consequences of his contradiction same as a witness. 312 M438.

D) This move without Motion, request after the trial constitutes an abuse of the judge's discretionary power, amounting to a violation of the law.

(No. 2 of Statement) This document entitled SUPPLEMENTARY ADDITION is in files of this case and is a part brief argued September 23 and there was no question, opposition to if and a statement alleged and not denied, must be considered as being true. 99 N.E. 2nd 155.

"The theory upon which our political institutions rest is that all men have certain inalienable rights—that among these are life, liberty and pursuit of happiness—and that in the protection of these rights all are equal before the law."

Cummings v. *Missouri, 71 U.S. 277*, quoted by McKinney, J. in *Beardsley* v. *Cunningham*, 103 S.W. 2nd 18, Tenn. 1937.

(No. 3 of the Statement) (a) It is the prime requisite of a judge to aquaint himself with the law. 333 Massachusetts 496.

b) This excerpt no. 4 in *Motion for Mistrial* is a part of a brief given Massachusetts Supreme Court and it was not questioned on a hearing, and statement alleged and not denied must be considered as being true.

c) The presiding Judge Rome had no choice but to argee to a jury since Plaintiff and Defendant agreed, and since he disagreed, became a third party to the dispute, violating his oath of office to be fair and impartial and to uphold the Constitution, showing extreme prejudice. 42 U.S.C. 1981.

Even if the Plaintiff did not agree to a jury trial, defendants should have been allowed as late jury claims are freely given. Here are 2 Massachusetts cases where late claim for jury was allowed, these parties claimed a jury, then waived them, then wanted it back again, allowed.

Gechijian & Richmond Ins. Co., 1940 A.S. 153, 25 N.E. 2nd 385; J. N. Dalton & Post Pub. Co., 328 Mass. 595 (1952) 105 N.E. 2nd 385.

"It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances and that it applies to the exercise of all powers of the state which can affect the individual or his property. . . . Discrimination of an unusual character especially suggests a careful consideration to determine whether they are obnoxious to the constitutional provision."

McReynolds, Hartford S.B. I. & Ins. Co. v. Harrison, 301 U.S. 459, qaoting from *Louisville G.&E.Co. v. Coleman*, Auditor, 277 U.S. 32, 1937.

It was against the enactments of new laws which ignored the proceedings according to the course of the common

law, and provided summary methods of determining legal rights, that the protecting shield of the constitution was required. The true criterion is, "Does the act destroy or materially impair the right of trial by jury, according to the course of the common law, in cases proper for cognizance of a jury?"

Risser v. *Hoyt*, Mich. 185, quoted in *Guardian D. Corp.* v. *Darmstaeter*, 288 N.W. 59, 290 Mich. 445, 1939.

A jury trial "is the most cherished if not the most valuable institution, as having derived from our Saxon ancestors."

Whitcaker v. *Chicago*, R.I.&P.R.Co., 252 Mo. 432, quoted by Speer, J. in *Century Indemnity Co.* v. *Carnes*, 138 S.W. 2nd 555, Tex. 1940

(No. 4 in Statement) (a) There was no witness to the alleged accident and death, the 2 photos taken by the police is the basic evidence and one of them was missing, also police report of this happening.

b) The judge erred in excluding basic information for the plaintiff has the burden of proof. 314 Mass. 16.

Failure to support burden of proof is verdict for defendant. 289 M. 431.

The judge did not know the basic facts to make a fair judgment, due process of the law was denied to petitioner.

"The guaranty of due process, as has often been held, demands only that the law shall be not unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained."

Arnold, J. Walker v. *Popenoe*, 149 F.2nd 511, D.C. 1945.

(No. 5 of Statement) These findings of the Massachusetts Courts without explanation in law are but mere opinions of men.

". . . so that in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth, "may be government of laws and not of men."

Yick Wo v. *Hopkins*, 118 U.S. 365, quoted in *C.C. Fosgate Co.* v. *Kirkland*, 19 F. Supp. 153, 1939.

In *People* v. *Niesman*, 356 Ill. 322, we (Supreme Court of Illinois said) "The guaranty of due process of law requires that every man shall have the protection of his day in court and the benefit of the general laws."

Quoted by Gunn, J. in *Griffin* v. *Cook County*, 16 N.E. 2nd 906, 369 Ill. 380, 1938.

6) Protection of the government denied.

a) As the petitioner pointed out Building Inspector's office has secretaries, steel cabinets and he did not bring in the pictures taken at 9 A.M. because it would— these steps normal, good condition.

b) Frank Cygan, respondent paid 2 monthly installments on a $1,000. policy and got a $1,000. as for natural death and turned around and sued the petitioner as for accidental death, which the petitioner proved by Transcript before the Massachuetts Supreme Court.

c) Sergeant Gelinas (and it was the petitioner who subpoenaed him to court when he was not present at the trial) admitted this picture taken by him 2:15 A.M. showed the steps dislocated, stringer pulled, step pushed in. The respondent also admitted the same but did not know who did the dislocating. The petitioner pointed out before the Massachusetts Supreme Court there must be no doubt in law. Landlord is party "A" and party "B" that dislocated the steps should be sued. 229 Mass. 177.

d) Motion for a hearing and an Application for Stay of Proceedings under 28 U.S.C.A 2101 was denied without a

hearing and respondent's Motion for Execution of Judgment was allowed by the Superior Court judge.

A Petition and the same Application sent to Massachusetts Supreme Court was returned without comment.

"There is no more sacred duty of the court than in a case properly before it, to maintain unimpaired these securities for personal right of the individual which have received for ages the sanction of the jurist and the statesmen: and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

Miller, J., Ex parte Lange, 85 U.S. 163 quoted by Cunningham, J., in *Com. v. Cunningham*, 9 A.2nd 161, 137 Pa. Super. 488, 1939.

7) Natural Laws ignored.

a) (Exhibit A) shows the dead man lying by the end of the house, in an open yard, in a white shirt, about 45 ft. away from the sidewalk. Frank Cygan drove his car over the sidewalk, going directly with his headlights on toward the dead man and parked his by the side of this house, his front bumper would have been almost over the body, and this is the presiding judge's understanding of the evidence. Near the end of the evidence Transcript page 135.

The Court: The witness says I first after he turned the ignition off and he got into the yard and was on the steps as I understand it.

Frank Cygan: I was ready to shut off my ignition. I was going to put out my lights, that is when I noticed what he was lying——

The Court: On the steps?

Frank Cygan: Yes.

Slusarz: I am asking him if it is possible—

The Court: I exclude the question.

An auto travelling at night with it's headlights on, would notice a man lying out in the straight ahead, with a white shirt on say over 300 yards or so.

This man is seen lying supposedly fallen from the steps, on his right side, his right hand extended fully underneath him, his left stretched at right angle, palm up. No abrasions on hands or feet, only injuries to head, right shoulder, abrasion on the right shoulder blade on back. A man falling forward conscious would instinctively put his hands up and injuries would be to his hands and feet and not on the tip of the right blade on back, for this is against the law of physics that a one material body can not occupy 2 separate places at the same time for the petitioner's defense was that this man used to sleep on the back porch, complained of shortness of breath, told to take out an insurance out on him, as he'll not live long. His stepson took out an insurance and paid 2 monthly installments, came home after midnight June 8, 1951 found his stepfather dead on the porch, threw him down unto the ground, dislocated the steps, called the police.

For the foregoing reasons this petition for a writ of certiorari should be granted.

APPENDIX A

Statutory Provisions Cited and Quoted.

OPINIONS (ORDERS)

Massachusetts Hampden ss. Supreme Court. =966.

After hearing Petition, dismissed on ground no meritorious case has been shown. Massachusetts Supreme Court September 23, 1959.

Massachusetts Hampden ss. Superior Court. =7555=

Claim for trial by jury having been waived in this case the Court finds for the Plaintiff and assesses damages in the sum of $5,000. March 25, 1956. (Dewing, J.)

October 29, 1959 Endorsement on Plaintiff's Motion for Judgment and Execution allowed (Dewing, J.).

ALBERT SLUSARZ,
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